MALAYSIAN REPORTS

LIM KIT SIANG v. DATO SERI DR. MAHATHIR MOHAMAD

[S.C. (Salleh Abas L.P., Abdul Hamid C.J. (Malaya) & Abdoolcader S.C.J.) December 11, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 469 of 1986]

Contempt of Court – Whether words uttered by respondent brought judiciary into disrespect, disrepute and offended its dignity – Articulation of executive's frustration – Misunderstanding as to the role of the courts – Impugned remarks did not ex necessitate connote contempt – R.H.C. 1980, 0.52 – Courts of Judicature Act, 1964, s. 13(2) – Federal Constitution, art. 126.

Constitutional Law – Contempt of court – Articulation of executive's frustration – Federal Constitution, art. 126.

In this case the appellant had applied for an order of committal for contempt of court arising out of the remarks of the respondent in a interview given to and published in *Time* magazine. The application was dismissed in the High Court and the appellant appealed.

Held: (1) viewed objectively and dispassionately and in proper perspective the excerpt complained of appears to be an articulation of the executive's frustration in not being able to achieve its objects in matters where the intervention of the courts have been sought to some avail, and the way the position is expressed, perhaps somewhat injudiciously in that it may not inconceivably well be open to misconstruction, does not amount to an attack on the courts as to constitute a contempt, but only stems from a misconception of the role of the courts;

(2) in this context there is no call to be overly hypersensitive and to overact impetuously as the impugned remarks do not *ex necessitate* connote, within the requisite of the strictest burden of proof for proceedings for contempt, an attack on the judiciary in the way suggested by the applicant but rather tend to ventilate, perhaps understandably, the vexation of the executive in not being able to get through some desired objective or end without curial intervention;

(3) this is not a case where leave should be given to apply for committal proceedings.

Cases referred to:

(1) *Surendra* v. *Nabakrishna* A.I.R. 1958 Orissa 168, 169.
(2) *King* v. *Dunbabin & Anor.* (1935) 53 C.L.R. 434 at 435, 436, 442, 444.
(3) *Regina* v. *Commissioner of Police of Metropolis, ex parte Blackburn (No. 2)* [1968] 2 Q.B. 150, 154.

HIGH COURT (December 3, 1986)

Karpal Singh (*Oh Choon Ghee* with him) for the applicant.

Harun J.: This is an application under RHC. 1980 0.52 for leave for an order of committal for contempt of Court allegedly committed otherwise than in connection with any proceedings. The power of the High Court to punish for contempt of itself is contained in –

(a) Article 126 of the Federal Constitution which reads:

"The Supreme Court or a High Court shall have power to punish any contempt of itself."; and

(b) Section 13(2) of the Courts of Judicature Act, 1964 which reads:

"The High Court shall have power to punish any contempt of itself."

The respondent (currently the Prime Minister) gave an interview to the International Editor and the Bangkok Bureau Chief of *Time* magazine at Parliament House in Kuala Lumpur. Excerpts of the interview under the heading "I Know How the People Feel" were published in the November 24, 1986 issue of *Time* magazine and contains the following passage at page 18:

"On the Courts. The Judiciary says (to us), 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation.' If we disagree, the courts will say, 'We will interpret your disagreement.' If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish."

The applicant says that this "statement by the respondent has scandalised the Judiciary in this country in that read as a whole the words uttered by the respondent referred to hereinbefore bring the Judiciary into disrespect, disrepute, offend its dignity and are an affront to its majesty. The words, 'If we disagree, the courts say, "We will interpret your disagreement" ' are insulting, cynical, uttered with tongue in cheek and intended to ridicule the Judiciary as a whole. The said words were uttered by the respondent to needlessly embarrass the Judiciary. The said words also amount to a challenge to the authority of the Judiciary and the Doctrine of Separation of Powers guaranteed by the Federal Constitution. The said words amount to threatening and intimidating the Judiciary."

At this stage of the proceedings, I need only decide whether the statement *ex facie* amounts to contempt of Court.

In support of his argument that the statement is a contempt of Court, Mr. Karpal Singh referred to (a) *Surendra* v. *Nabakrishna*[1] where it was held:

"The maintenance of the prestige and dignity of the High Court is the concern of every citizen of India and is safeguarded by some of the important provisions of the Constitution such as Arts. 211 and 215. It is also the special concern of a Member of Parliament who, by the oath taken by him while sitting as a member, undertakes to bear true faith and allegiance to the Constitution. If therefore a Member of Parliament feels that a member of the State Legislature has misused the right of freedom of speech conferred on him by the Constitution and that his speech has a tendency to impair the dignity and prestige of the High Court, then it cannot be said that he is not entitled to bring to the notice of the High Court the objectionable passage, "for such action as the High Court may desire to take. Thus, an objectionable speech made on the floor of a Legislature can be brought to the notice of the High Court by a private party."

Any act done or writing published calculated to bring a Court or the Judge of a Court into contempt or to lower his authority is contempt of Court. A statement by the Chief Minister of a State to the effect that "in many instances the immaturity of the High Court is apparent," contains an aspersion regarding the competency of the Judges of the High Court. His remarks that "in many instances the judgment of the High Court were corrected by the Supreme Court and that "in many instances" the "Supreme Court held that the High Court has abused (apabyabahara) the powers given to it" tend to lower the authority of the High Court a considerable extent and bring the Judges into contempt. The use of the expression 'apabyabahara' conveys the idea that the High Court has abused its powers, and is indeed objectionable and contains an imputation to the effect that the powers were used improperly."

And at page 169 :

"In cases of contempt, it is not the intention of the alleged contemner but the effect of undermining or lowering the court in the estimation of the public or its tendency or likelihood to so undermine or lower the Court is the real test.

"The punishment for contempt is inflicted not for the purpose of protecting either the Court as a whole or the individual judges of the court from a repetition of the attack but for protecting the public and specially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the Tribunal is undermined or impaired. Nothing is more incumbent on the Courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public.

The Courts, however, are not too sensitive or touchy in this respect. The dignity of the Court is not so frail as to be easily affected by casual remarks or comments."

In that case a survey was held by the High Court to be illegal. The State appealed to the Supreme Court. Before the appeal was heard, the Chief Minister of Orissa (Nabakrishna) moved a Bill in the State Legislature to validate the survey. In the course of his speech, the Chief Minister said :

"At present our Constitution is new, the High Court is new. In many instances, the immaturity of the High Court is apparent. In many instances the decision given by the High Court has been corrected by the Supreme Court. The Supreme Court also held that in many instances the High Court has abused the powers given to it."

The Court held that the Chief Minister's speech amounted to contempt of Court but that as it was made in the Legislature, he was entitled to claim immunity from the jurisdiction of the court. (b) *The King* v. *Dunbabin & Anor.*,[2] a decision of the High Court of Australia arising out of an article in a newspaper which *inter alia* said (at page 435) :

"*Courts & Cabinets* – Some time ago the Assistant Treasurer (Mr. Casey) complained of the manner in which the High Court knocked holes in the Federal laws. Those laws have certainly been perforated by the keen legal intelligences of the High Court Bench. One of the results of this game (a very expensive game for the taxpayers) is that the law which was relied upon to keep Australia white is in a state of suspended animation."

And at page 436 :

"When the amendments are made we should invite him to jump ashore again to see whether the new Act pleases the High Court any better than the old, or whether the ingenuity of five bewigged heads cannot discover another flaw. Upon another and more recent occasion, though it was declared by the representative of the party which passed an Act that his intention was to include secondhand dealers in the provisions of the sales tax, the High Court, with that keen, microscopic vision for splits in hairs which is the admiration of all laymen, discovered that they were not included, and that a tax had been illegally collected for over four years. Well may the Caseys and the Kellys cry, like the historic British monarch, for some gallant champion to rid them of this pestilent Court."

In the course of his judgment Rich J. said at page 442 :

The jurisdiction (of the power of the Court to punish for contempt of itself) "is not given for the purpose of restricting honest criticism based on rational grounds of the manner in which the Court performs its functions. The law permits in respect of Courts, as of other institutions, the fullest discussions of their doings so long as that discussion is fairly conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the Courts may be established and maintained."

At page 444 Rich J. continued :

"I think the effect of the article, as well as its purpose, is to represent that the Court exercises its ingenuity in order to defeat legislation to which great public importance attaches and that the Federal Government encounters in the Court

an obstacle it might well seek to remove.... Such imputations, if permitted, could not but shake the confidence of litigants and the public in the decisions of the Court and weaken the spirit of obedience to the law."

The Court found the respondents guilty of contempt. In the instant case, the statement of the respondent has to be read against the background of the doctrine of the Separation of Powers between the Legislature, the Executive and the Judiciary. The function of the Legislature is to make laws. The function of the Judiciary is to interpret the laws (made by Parliament) as it stands and not as the Judiciary fancies it should be. There is a long list of decided cases on this point.

On analysis I find :

(a) "Although you passed a law with a certain thing in mind, we think your mind is wrong, and we want to give our interpretation" – is not a correct statement because the Court does not substitute the intention of the Legislature with that of its own.

(b) "If we disagree, the Courts will say, 'We will interpret your disagreement'." It is not clear what is meant by this but in an adversarial system, the Court must decide in favour of one party against the other. The Court certainly does not interpret a disagreement. It either accepts or rejects an argument, giving reasons for its decisions.

(c) "If we go along, we are going to lose our power of legislation." – If by "we" is meant the Executive, then it is obvious that under the Constitution, the Executive has no powers to legislate. But if by "we" is meant the power of the Executive to introduce Bills in Parliament, that power can never be taken away by the Judiciary. The Courts do not initiate legislation, merely interpret it. It may well be that occasions may arise (and they have often done in the past not only in this country but in other countries as well) that a judgment of the Court triggers off new legislation because the Legislature cannot be expected to foresee all the possibilities of the future.

(d) "We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way," – If the Court gives an interpretation different from that intended by the Executive when it introduced the Bill in Parliament, then the obvious conclusion is that the Parliamentary Draftsman has not done a good job or misunderstood the intentions of the Executive. The remedy is to amend the law and it is wrong to say "we have no means to reinterpret it our way" unless of course the law remains unchanged.

(e) "If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish." – At least the respondent concedes that it is the function of the Court to interpret the law. The Courts find no difficulty in determining the intention of the Legislature where the provisions contained in any Act of Parliament are clear and unambiguous. Perhaps the time has arrived to design a new format for Acts of Parliament either by means of a comprehensive preamble to the Act declaring the intentions of the Legislature or in an Introductory Part in the main body of the Act stating the objects and reasons for the Act, so that the intention of the Legislature is clear to all, including the Judiciary. I do not, however, find in this part of the statement the Sword of Damocles or the harbinger of a dictatorship.

In my view, the statement read as a whole is merely an expression of the respondent's dilemma and reflects some elements of confusion on the subject of the doctrine of the Separation of Powers.

Does the statement amount to a contempt of Court as illustrated by the Indian and Australian cases referred to by Mr. Karpal Singh? It is important that the Courts should be the subject of free criticism. It is equally important that the dignity and authority of the Court should be maintained. It is the reconciliation of these two principles that involves the difficulty in deciding cases of contempt of Court.

In *Regina* v. *Commissioner of Police of the Metropolis. Ex parte Blackburn (No. 2).*[3] Lord Denning M.R. said at page 154:

"This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.

Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even

outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to the criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."

In that case, the Rt. Hon. Quintin Hogg Q.C., M.P., wrote an article which was published in the weekly periodical "*Punch*" which in part said:

"The recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judges. The legislation of 1960 and thereafter has been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous, decisions of the courts, including the Court of Appeal. So what do they do? Apologise for the expense and trouble they have put the police to? Not a bit of it. Lambaste the police for not enforcing the law which they themselves had rendered unworkable and which is now the subject of a Bill, the manifest purpose of which is to alter it. Pronounce an impending dies irae on a series of parties not before them, whose crime it has been to take advantage of the weaknesses in the decisions of their own court. Criticise the lawyers, who have advised their clients. Blame Parliament for passing Acts which they have interpreted so strangely. Everyone, it seems, is out of step, except the courts. . . . The House of Lords overruled the Court of Appeal . . . it is to be hoped that the courts will remember the golden rule for judges in the matter of obiter dicta. Silence is always an option."

The Court held that despite inaccurate statements of fact in the article, the statement was not a contempt of court but within the limits of free speech.

The right of every individual (including the Prime Minister) to freedom of speech in this country has been consistently upheld by the Courts subject only to any restrictions that are prescribed by the Constitution itself. There is no reason to deny that right to the respondent in the instant case. The Court should not be over sensitive to criticism. The impunged statement, read objectively is not even a criticism of the Court far less scandalising it or a threat to the independence of the Judiciary. In essence it is the despair of a Prime Minister on the inadequacies of the law and more particularly the officials whose duties are to translate into law the policies and aims of the administration to ensure a more effective Government. But however comprehensive laws might be there is still no 100% guarantee that the Government will win its cases in Court all the time. If that were so, the public will lose confidence in the Judiciary altogether. Apart from the law, the decision in a case much depends on the facts and it is in this area that improper or poor enforcement of the law by the Executive and its agencies which results in failure of Government cases in the Courts.

Taking into account fair criticism, free speech and the maintenance of the dignity and authority of the Courts as propositioned in the cases referred to in this judgment and an objective evaluation of the impugned statement, I held that the respondent's statement *ex facie* does not amount to a contempt of Court and accordingly dismissed the application.

[*The applicant appealed to the Supreme Court.*]

SUPREME COURT.

Karpal Singh (*Oh Choon Ghee* with him) for the appellant.

Tan Sri Abu Talib bin Othman, Attorney-General, (*T. Selventhiranathan,* Senior Federal Counsel with him) for the respondent.

Salleh Abas L.P. (delivering the Judgment of the Court): In this appeal against the refusal of leave by the High Court to apply for an order of committal against Dato Seri Dr. Mahathir Mohamad, we have carefully considered the passage attributed to him appearing at page 18 in the *Time* magazine of the issue of November 24, 1986, and would say that viewed objectively and dispassionately and in proper perspective the excerpt complained of appears to be an articulation of the executive's frustration in not being able to achieve its objects in matters where the intervention of the courts has been sought to some avail, and the way the position is expressed, perhaps somewhat injudiciously in that it may not inconceivably well be open to misconstruction, does not amount to an attack on the courts as to constitute a contempt, but only stems, in our view, from a misconception of the role of the courts.

When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. The courts have a constitutional function to perform and they are the guardian of the Consti-

tution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review – a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals *inter se*, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law.

We trust that any misunderstanding as to the role of the courts will accordingly be dispelled, and in this context and against the background of what we have just said, there is no call to be overly hypersensitive and to overact impetuously as the impugned remarks do not *ex necessitate* connote, within the requisite of the strictest burden of proof for proceedings for contempt, an attack on the judiciary in the way suggested by the applicant but rather tend to ventilate, perhaps understandably, the vexation of the executive in not being able to get through some desired objective or end without curial intervention.

In the circumstances we have adumbrated we are of the view that this is not a case where leave should be given to apply for committal proceedings for contempt of court, and we accordingly dismiss this appeal.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

TAN KHIEN TOONG & ORS. v. HOONG BEE & CO.

[S.C. (Wan Suleiman, Seah & Hashim Yeop A. Sani S.C. JJ.) December 6, 1984 & October 18, 1986]

[Kuala Lumpur – Federal Court Civil Appeal No. 126 of 1984]

Contract – Landlord and Tenant – Agreement for tenancy of premises – Tenant to enjoy uninterrupted possession so long as he pays rents regularly – Payment of premium alleged but not proved – Agreement not registered – Equitable estoppel – Application of equity – Civil Law Act, 1956 (Act 67), s.3(1)(a).

Landlord and Tenant – Agreement not registered – Tenants at will – Tenancy from month to month – Notice to quit – Termination – No valid defence.

In this case the relevant facts were that on March 31, 1962 an agreement in writing was entered into between Tan Kwan, the landlord (since deceased) of the one part and Hoong Bee & Co., the tenants (respondents herein) of the other part, whereby the tenants were let into possession of the whole of the ground floor of the shop premises known as No. 171-D, Jalan Rahang, Seremban, at the monthly rental of $170.00 as from April 1, 1962. Clause 2 provides that "so long as the tenants shall pay the monthly rental of the demised premises punctually and promptly on the first day for every month and in any event not later than the fourteenth day of any month, and strictly adhere and abide by the terms and conditions contained herein, the tenants shall enjoy uninterrupted occupation of the demised premises, and the landlord shall not hinder, obstruct or determine the tenants' right to such enjoyment under any circumstances." This agreement shall be binding on the heirs, executors, administrators and assigns of the landlord and also on the successors, administrators and executors of the tenants (see clause 7). The respondents went into occupation of the shop premises and paid the monthly rent of $170.00 to the landlord, Tan Kwan. After the death of Tan Kwan, the appellants became the registered co-owners of the shop premises and accepted the rent tendered by the respondents. As a result, the legal relationship of landlord and tenant was created between the parties. It was conceded that the written agreement of March 31, 1962 was never registered at the Land Registry office.

The appellants claimed that the respondents were monthly tenants and on May 19, 1978 they instructed solicitors to send a notice to quit to the respondents terminating their tenancy on July 31, 1978. When the respondents refused to vacate from the shop premises the appellants took action in the Magistrate's Court at Seremban for an order for possession and other incidental reliefs.

The crux of the defence of the respondents was that by reason of their having paid $9,000.00 as premium to the late Tan Kwan they were given a tenancy in terms of clause 7 aforesaid. Even though the agreement of March 31, 1962 was not registered they contended that they were induced by the late Tan Kwan to pay the money over in the expectation of being allowed to stay there indefinitely so long as they paid the rental regularly. They therefore invoke the principle of equity to protect them